No. 90-5635

In The

Supreme Court of the United States

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

JOEL I. KLEIN
CHRISTOPHER D. CERF*
ALAN E. UNTEREINER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes a district court to refer, without the parties' consent, to a magistrate for recommended findings a prisoner petition that challenges "conditions of confinement," applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions.

LIST OF PARTIES

Pursuant to Rule 24.1(b), the parties to the proceeding below were as follows:

The appellant in the Second Circuit was John J. McCarthy; the appellees were Warden George Bronson, Lt. Steve Tozier, Officer Paul Lusa, and Officer Mickiewicz.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTORY AND LEGISLATIVE MATERIAL

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 906 F.2d 835, and reprinted at J.A. 59. The magistrate's unpublished Recommended Findings of Fact and Memorandum of Decision is reprinted at J.A. 33. The district court's unreported opinion denying petitioner's motion for postjudgment relief is reprinted at J.A. 52.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were issued on June 22, 1990. On July 17, 1990, McCarthy filed a petition for rehearing, which was denied in an unpublished order on August 6, 1990. J.A. 71. The petition for certiorari was filed on August 21, 1990 and granted on December 10, 1990, along with petitioner's motion to proceed *in forma pauperis*. J.A. 72. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution as well as various provisions of the Federal Magistrates Act, 28 U.S.C. § 636 ("the Act"). The Seventh Amendment provides in full, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

reexamined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 636(b)(1) provides in full:

> Notwithstanding any provision of law to the contrary –
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

In addition, 28 U.S.C. § 636(c) provides that "[u]pon the consent of the parties" a magistrate "may conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case."

STATEMENT

This case arose out of an incident at the Connecticut Correctional Institute at Somers (CCIS) on July 13, 1982. On that date, petitioner, an inmate at the prison,[1] was sprayed with tear gas and forcibly removed from his cell by various CCIS employees. Pursuant to 42 U.S.C. § 1983, McCarthy brought suit against the warden, the commissioner, and four prison guards, alleging that during the July 13 episode the guards had used excessive force in violation of his rights under the Eighth and Fourteenth

---

[1] Petitioner has since been transferred from CCIS and currently resides at the federal penitentiary in Leavenworth, Kansas.

Amendments. J.A. 11-24, 33.[2] Over his objection, McCarthy's case was tried before a magistrate, who recommended that judgment be entered in favor of the defendants. J.A. 49. The district court adopted the recommendation and entered judgment. J.A. 50. The Court of Appeals for the Second Circuit affirmed, holding, *inter alia*, that the reference to the magistrate was proper under 28 U.S.C. § 636(b)(1)(B), a provision of the Federal Magistrates Act authorizing a judge to refer "prisoner petitions challenging conditions of confinement" to a magistrate without the consent of the parties. J.A. 65-66.

1. *The Events of July 13, 1982.* At nine o'clock on the morning of July 13, prison authorities informed petitioner that they planned to move him from his cell, an isolation cubicle on death row, to another cell in administrative segregation. J.A. 34. Shortly after lunch, a guard visited McCarthy and asked him whether he was packed. J.A. 35. Believing that the instruction to pack was not a direct order, petitioner refused to gather his materials. *Ibid.* Instead, he indicated that he wanted to know why he was being moved and asked to see a supervisor. *Ibid.*

Having been informed of petitioner's request, the supervisor of the segregation unit decided to carry out the decision to remove petitioner. J.A. 35, 44. At approximately 2:30 p.m., McCarthy learned from other inmates that some guards were forming a group and "rolling." J.A. 36. Panicking, petitioner tied his cell door shut with

---

[2] McCarthy also alleged that defendants committed assault and battery in violation of state law. *See* J.A. 33. Several substitutions and changes in the named defendants were made prior to trial. *Ibid.*

clothesline and jammed a piece of plastic spoon into the keyhole. *Ibid.* Shortly thereafter, a group of four guards arrived at his cell. *Ibid.* After unsuccessfully attempting to persuade petitioner to come out, the guards sprayed him with a tear gas "duster." J.A. 37-38. The active ingredient in the tear gas duster, choloracetophenone, is "a lacrimating agent which induces profuse watering of the eyes" and "cause[s] the eyes to burn and sting." J.A. 41, 42. After discharging their chemical weapon, the guards removed petitioner from his cell, handcuffed him, and transported him to the segregation unit. J.A. 38.[3]

2. *The Proceedings in the Trial Court.* On April 11, 1983, McCarthy filed this *pro se* action in the District Court for the District of Connecticut. J.A. 3. The gravamen of petitioner's complaint, which sought both damages and injunctive relief, was that respondents had unlawfully sprayed him with tear gas and otherwise used excessive force when they removed him from his cell during the July 13 episode. J.A. 5, 9, 13-22; *see also* J.A. 28-29, 33.[4] That same day, petitioner's complaint was

---

[3] Although petitioner's initial request to shower was denied, eventually he was permitted to do so. J.A. 38-39. He subsequently complained of chemical burns on various parts of his body. J.A. 40.

[4] Petitioner's successive complaints "all . . . consistently set forth the constitutionality of the use of mace [during the July 13, 1982 episode] as *the* issue to be resolved" at trial. J.A. 29 (emphasis added); *see also* J.A. 33. To the extent that petitioner's Second Amended Complaint could be read more broadly to allege additional legal claims, a pretrial ruling effectively narrowed the issues to include only his claim regarding the use of mace. *See* J.A. 25, 28-29. In particular, his claim that he had been improperly denied good-conduct time appears not to have been pursued or adjudicated.

referred to a magistrate for "further pretrial proceedings" under 28 U.S.C. § 636(b)(1). J.A. 2, 61.

On February 28, 1985, the parties signed a standard consent form in which they agreed to have the entire case tried before a magistrate pursuant to 28 U.S.C. § 636(c). J.A. 61; *see also* J.A. 7. A week later, the district court entered an order referring the case "in accordance with" that provision. J.A. 8, 61. On the first day of trial, however, petitioner sought leave to withdraw his consent, and the magistrate permitted him to do so. J.A. 30-32; *see also* J.A. 62. Despite this development, and contrary to the wishes of petitioner, the magistrate proceeded to conduct a bench trial, apparently relying on that portion of 28 U.S.C. § 636(b)(1)(B) that authorizes a magistrate, upon referral by a district judge, "to conduct . . . evidentiary hearings, and to submit to a judge . . . proposed findings of fact and recommendations for the disposition . . . of prisoner petitions challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B); J.A. 64. On May 23, 1989, the magistrate issued his "Recommended Findings of Fact and Memorandum of Decision," which found in favor of defendants on all of petitioner's claims. J.A. 33, 49.

On June 19, 1989, the district court adopted the magistrate's report and entered judgment for defendants, noting that no objection to the findings or recommendation had been filed within ten days as required by 28 U.S.C. § 636(b)(1) and a local rule of court. J.A. 50-51. On June 22, 1989, however, petitioner filed objections to the magistrate's Recommended Findings of Fact and Memorandum of Decision. J.A. 54. A week later, on June 29,

petitioner filed a motion for relief from judgment, arguing that he had not received the magistrate's report until June 7 and therefore lacked sufficient time to respond before the court entered judgment. *Ibid.*

The district court denied the motion on August 17, 1989. J.A. 54-55. In its ruling, the district court sought to clarify the procedural posture in which the case came to it. Reasoning that "Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c)" – the section authorizing consensual references – the court dismissed petitioner's attempted appeal pursuant to that section. J.A. 55. The court concluded that the magistrate was instead "essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2)," J.A. 53, and that his findings were therefore conclusive unless shown to be " 'clearly erroneous,' " J.A. 54 (quoting Fed. R. Civ. P. 53(e)(2)).[5] "Even upon a *de novo* determination," the court then held, it "would reach the same

---

[5] Under 28 U.S.C. § 636(b)(2), a district judge may designate a magistrate to serve as a special master either (1) "pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure," in particular, Fed. R. Civ. P. 53; or (2) "in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b)." Non-consensual reference to a special master under Rule 53 is permitted only in certain, limited circumstances. See Fed. R. Civ. P. 53(b) ("A reference to a master shall be the exception and not the rule."). Rule 53(b) draws a sharp distinction between jury and nonjury actions, permitting references in jury actions "only when the issues are complicated" and in nonjury actions – with the exception of "matters of account and of difficult computation of damages" – "only upon a showing that some exceptional condition requires it." In nonjury matters, the special master's "findings of fact"

(Continued on following page)

conclusions as the Magistrate regarding the matters to which there has been objection." J.A. 55.

3. *The Court of Appeals Decision*. The United States Court of Appeals for the Second Circuit affirmed. J.A. 59. At the outset, the court acknowledged that the case was "complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings." *Ibid.* After reviewing the "tangled sequence of events" giving rise to this uncertainty, J.A. 63, the court turned to the issue of the magistrate's authority to conduct the trial.

The court began by holding that the reference to the magistrate could not be sustained under § 636(b)(2), the provision that authorizes magistrates to serve as special masters.[6] Thus, the reference could be upheld only if proper under § 636(c), which authorizes consensual references, or § 636(b)(1)(B), which authorizes non-consensual

---

(Continued from previous page)

are accepted by the district judge "unless clearly erroneous." Fed. R. Civ. P. 53(e)(2). In matters tried before a jury, however, the special master "shall not be directed to report the evidence" but rather his "findings upon the issues submitted to [him] are admissible as evidence of the matters found and may be read to the jury." Fed. R. Civ. P. 53(e)(3); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2604, at 783 (1971 & Supp. 1990) ("[T]he report of the master is merely evidence, which the jury is free to disregard . . . . ").

[6] The court noted that "this fairly straightforward section 1983 suit" likely would not "qualify for reference to a special master under the exacting standards of Rule 53(b)." J.A. 67. *See supra* note 5.

references of "prisoner petitions challenging conditions of confinement." With respect to the former, the court observed that the magistrate "could have proceeded" under the original consent form, but "elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference." J.A. 64. It acknowledged that "[a]rguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given" under § 636(b)(1). The court nonetheless concluded that the magistrate was not "required to take such a narrow view of his authority" but could instead construe the earlier reference of pretrial matters as empowering him to conduct the trial under the prisoner-petition clause of § 636(b)(1)(B). J.A. 64-65.

The court of appeals then turned to the "more substantial question . . . whether McCarthy's lawsuit is a petition 'challenging the [sic] conditions of confinement' within the meaning of subsection 636(b)(1)(B)." J.A. 65. The court first explained that this phrase had originated in a 1976 amendment to the Federal Magistrates Act, *see* Pub. L. No. 94-577, 90 Stat. 2729 (1976), but observed that the House Report accompanying the bill "does not explain the [prisoner-petition] category." J.A. 65. The court rejected the view, adopted by several circuits, that the phrase "conditions of confinement" includes "only challenges to pervasive prison conditions and [not] claims concerning specific episodes of misconduct by prison officials." *Ibid.* (rejecting *Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987) and *Hill v. Jenkins*, 603 F.2d 1256, 1259-60 (7th Cir. 1979) (Swygert, J., concurring)). Instead, the Second Circuit aligned itself with those decisions that "have construed the phrase ['conditions of confinement']

broadly to include almost any complaint made by a prisoner against prison officials." *Ibid.* (citing *Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989)). Believing that the prisoner-petition clause covered virtually all prisoner litigation brought under 42 U.S.C. § 1983, the court of appeals concluded that it encompassed claims founded on a single episode of unconstitutional conduct. Accordingly, the court held, the magistrate was authorized to conduct petitioner's trial notwithstanding his lack of consent. J.A. 65.[7]

Petitioner filed a petition for rehearing on July 17, 1990, which was denied on August 6, 1990. J.A. 71. This Court granted certiorari on December 10, 1990. J.A. 72.

SUMMARY OF ARGUMENT

Petitioner's complaint – which alleged a single episode of unconstitutional conduct directed exclusively at him – does not constitute a "petition[] challenging conditions of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B). Accordingly, it was error to refer the case, without his consent, for trial before a federal magistrate.

1. As most courts of appeals have concluded, the phrase "conditions of confinement" refers to ongoing

[7] The court of appeals also upheld the denial of petitioner's demand for a jury trial, request for free transcripts, and his miscellaneous challenges to the magistrate's findings of fact. J.A. 67-70. With respect to the jury trial issue, the court reasoned that petitioner's initial consent to the reference had operated as a waiver. These issues are not before this Court.

practices or circumstances generally affecting at least a segment of the prison population as a whole. *See, e.g., Clark v. Poulton*, 914 F.2d 1426, 1430 (10th Cir. 1990). Construing the statute in that manner is in keeping with common usage, as well as with this Court's consistent understanding of the term. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 319 (1986) (differentiating between cases challenging "conditions of confinement" and those alleging a single incident of excessive force). Moreover, precisely the same understanding is apparent from Congress's use of identical language in other statutory contexts. *See, e.g.*, 18 U.S.C. § 4013 (a)(4). Consistent with the "ordinary-. . . meaning" of the phrase, *Perrin v. United States*, 444 U.S. 37, 42 (1979), and the longstanding understanding of courts and Congress alike, a complaint alleging a single, isolated incident of unconstitutionally excessive force simply cannot be viewed as a "petition[] challenging conditions of confinement."

2. Both the structure of the Magistrates Act and the constitutional backdrop against which it was enacted confirm that § 636(b)(1)(B) does not authorize non-consensual reference of complaints predicated on a single episode of unconstitutional conduct. Because injunctive relief is rarely appropriate in such cases, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983), claims of this nature almost invariably seek damages as the principal or exclusive form of relief. Accordingly, under settled principles, the Seventh Amendment entitles litigants who bring such actions to trial by jury. As the history and text of the statute make clear, however, Congress did not empower magistrates to conduct jury trials in *any* case referred without the parties' consent – including those

referred pursuant to § 636(b)(1)(B). Congress – which is presumptively aware of the constitutional background against which it acts – could not have authorized the wholesale, non-consensual assignment of a class of cases, for which the parties are entitled to trial by jury, to a magistrate who lacks the power even to empanel a jury, much less conduct a full trial before one. *See Gomez v. United States*, 109 S. Ct. 2237, 2246-47 (1989).

3. Even were it appropriate to look beyond the text and structure of the Act, the legislative history of § 636(b)(1)(B) provides no basis for the construction adopted by the court of appeals. While largely silent on the meaning of the phrase "conditions of confinement," the history of the provision does demonstrate that Congress was seeking to strike a balance between two objectives: relieving district courts of some of their most time-consuming burdens while remaining "alert" to constitutional limitations on the delegation of judicial power to non-Article III officers. *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980). To satisfy the latter concern, Congress provided that any decision made by a magistrate pursuant to a non-consensual reference would be subject to *de novo* reconsideration by the district court – a standard of review inherently inconsistent with trial by jury. Interpreting § 636(b)(1)(B) as limited to purely injunctive actions alleging ongoing, pervasive circumstances or practices fulfills both of Congress's objectives: it delegates a large category of extremely onerous litigation to magistrates, while recognizing the care Congress took to assure that any such delegation conform to the Constitution.

ARGUMENT

The question presented in this case is whether a prisoner complaint alleging a single unconstitutional episode of excessive force qualifies as a "petition[] challenging conditions of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B) and is thereby subject to reference, without the parties' consent, to a federal magistrate. That question must be answered in the negative. The interpretation advanced by respondents is inconsistent with both the language and structure of the Act, which convey a clear intent to limit such references to injunctive actions challenging persistent, ongoing practices or conditions. Moreover, reading the Act to allow non-consensual reference of all prisoner complaints – including those for which the plaintiff is unquestionably entitled to a jury trial – ignores the limitations imposed by the Seventh Amendment. Congress's intent must be understood against the backdrop of that constitutional directive, which is plainly inconsistent with non-consensual reference of simple damages actions premised on a single episode of excessive force.

I. THE PHRASE "PRISONER PETITIONS CHALLENGING CONDITIONS OF CONFINEMENT" CANNOT FAIRLY BE READ TO INCLUDE SIMPLE DAMAGES ACTIONS ALLEGING A SINGLE INCIDENT OF EXCESSIVE FORCE.

By far the most natural reading of the Act is to construe the phrase "prisoner petitions challenging conditions of confinement" as limited to complaints concerning ongoing practices or circumstances (often embodied

in a regulation) that affect prisoners, or a class of prisoners, generally and, if proven, are subject to redress by appropriate injunctive relief. That interpretation, which has been endorsed by the clear majority of the courts of appeals, conforms with the common usage of the phrase "conditions of confinement," this Court's consistent understanding of its meaning, and Congress's use of identical language in related contexts.

Statutory language must be read according to its "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Pursuant to its common usage, the word "condition" "connotes an ongoing situation as opposed to an isolated incident." *Clark v. Poulton*, 914 F.2d 1426, 1430 (10th Cir. 1990). General as well as legal dictionaries attest to this linguistic fact.[8] And most federal courts interpreting § 636(b)(1)(B) have similarly concluded that a "condition" is a circumstance that is recurrent or lasting rather than ephemeral or transitory.[9] Such circumstances can range from generalized

---

[8] For example, *Webster's Third New International Dictionary* (1968) defines a "condition" as an "existing state of affairs," or "a mode or state of being." *Id.* at 473; *see also Black's Law Dictionary* 293 (6th ed. 1990) (defining "condition" as a "[m]ode or state of being," a "state or situation").

[9] Contrary to the suggestion of the decision below, most of the courts of appeals faced with the question have concluded that a complaint alleging an isolated incident of unconstitutional conduct does not constitute a petition "challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B). *See Clark v. Poulton*, 914 F.2d at 1429; *Houghton v. Osborne*, 834 F.2d 745, 749-50 (9th Cir. 1987); *Wimmer v. Cook*, 774 F.2d 68, 74 n.9 (4th Cir. 1985); *Orpiano v. Johnson*, 687 F.2d 44, 46-47 (4th Cir. 1982);

(Continued on following page)

aspects of the physical environment, *e.g.*, double bunking, to policies pertaining to access to the prison library. But it strains the "ordinary . . . meaning" of the phrase beyond the breaking point to suggest that a guard, by virtue of beating a prisoner on one occasion, creates a "condition of confinement."

The distinction between a "condition of confinement" and an isolated incident of unconstitutional conduct is well recognized in this Court's cases. Consistent with common usage, the Court has employed the term – which in many respects has achieved the status of a legal term of art – to describe ongoing, pervasive circumstances generally affecting prison life. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978) (challenging cell size, sleeping arrangements, food, working conditions and widespread incidence of prisoner-on-prisoner violence); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (challenging overcrowding); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenging a "potpourri" of generalized policies, including those limiting prisoner access to publications, authorizing random "shake-downs," and mandating body-cavity searches after visits); *Procunier v. Martinez*, 416 U.S. 396 (1974) (challenging, *inter alia*, regulations limiting prisoners' access to mail). Because such cases, unlike those challenging a single episode of excessive force, involve ongoing

---

(Continued from previous page)

see also Hill v. Jenkins, 603 F.2d 1256, 1259-60 (7th Cir. 1979) (Swygert, J., concurring). Indeed, apart from the decision under review, only the Eighth Circuit has reached a contrary conclusion. *Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989).

practices that are likely to recur, the plaintiffs generally have sought (and, where appropriate, obtained) injunctive relief rather than damages.[10]

Of particular significance is the decision in *Whitley v. Albers*, 475 U.S. 312 (1986). *Whitley* was a damages action brought by a prisoner who alleged that guards had shot him unnecessarily while trying to quell a disturbance. In setting out the appropriate standard of review, the Court carefully distinguished between Eighth Amendment claims that (1) challenge "conditions of confinement"; (2) allege a failure to address the medical needs of a particular prisoner, *see Estelle v. Gamble*, 429 U.S. 97 (1976); and (3) allege that prison authorities used excessive force to restore order. 475 U.S. at 319.[11] *Whitley* thus confirms the

---

[10] Unlike damages, which are available for any constitutional injury regardless of how transitory or isolated it may be, injunctive relief is available only where a party demonstrates that the wrong is likely to recur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (injunctive relief not available "absent a sufficient likelihood that [the plaintiff] will be wronged in a similar way").

[11] Noting that cases in the last category presented special concerns, the Court held that a prisoner bringing such a claim must demonstrate that force was applied " 'maliciously and sadistically for the very purpose of causing harm.' " 475 U.S. at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). With the single exception of *Wilson v. Seiter*, 893 F.2d 861 (6th Cir.), *cert. granted*, 111 S. Ct. 41 (1990), the courts of appeals have understood the *Whitley* standard to be inapplicable to cases challenging conditions of confinement and, correspondingly, have had no difficulty distinguishing conditions cases from cases involving excessive-force claims. *See, e.g., Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam), *modified in other respects*, 858 F.2d 1101 (5th Cir. 1988) (en banc) (per curiam).

distinction evident throughout the Court's prisoner-rights cases: a claim challenging conditions of confinement is different from one alleging a single isolated incident of unconstitutional conduct.

Finally, precisely the same understanding is apparent from Congress's use of the phrase "conditions of confinement" in other statutory contexts. *See, e.g.*, 18 U.S.C. § 4013 (a)(4) (authorizing Attorney General to enter into contracts "to establish acceptable conditions of confinement" in state facilities housing federal detainees); 42 U.S.C. §§ 1997a(a), 1997c(a)(1) (authorizing Attorney General to initiate injunctive actions challenging "egregious or flagrant conditions" in state prisons); 42 U.S.C. §§ 3769, 3769b(a)(1) (requiring state governments to develop a "plan for . . . improving conditions of confinement" as a precondition to receiving federal funds "to relieve overcrowding and substandard conditions"). In each instance, as the context of these provisions makes plain, Congress intended the phrase to refer to the physical environment of, or the pervasive, ongoing circumstances within, a jail or prison.[12]

---

[12] Numerous state statutes likewise employ the term "conditions of confinement" to mean ongoing and pervasive circumstances. *See, e.g.*, Ark. Stat. Ann. § 12-26-107 (1987 & Supp. 1989); Neb. Rev. Stat. § 83-4,131 (1987) (requiring personnel of state commission to "visit and inspect each criminal detention facility in the state for the purpose of determining the conditions of confinement, the treatment of prisoners, and whether such facilities comply with the minimum standards established by the board."); N.C. Gen. Stat. § 153A-222 (1990); W. Va. Code § 31-20-5 (1988 & Supp. 1990). Moreover, several state statutes

(Continued on following page)

In sum, the term "condition of confinement" – according to its ordinary meaning and as employed in prior decisions of this Court as well as in other federal statutes – refers to ongoing practices or circumstances generally affecting at least a segment of the prison population as a whole. To be sure, the distinction between a "condition of confinement" and an isolated instance of unconstitutional conduct, like most legal distinctions, may well blur at the edges. In practice, however, the lower federal courts have had little difficulty differentiating between the two categories – both in the context of interpreting § 636(b)(1)(B) and elsewhere, *see supra* note 11. This case is illustrative, for the line is easily drawn here. A case in which the only issue was whether guards violated the Constitution when, on one occasion, they sprayed a single prisoner with mace cannot be sensibly viewed as a petition challenging "conditions of confinement."

II. THE STRUCTURE AND PURPOSE OF THE ACT CONFIRM THAT CONGRESS DID NOT INTEND TO AUTHORIZE NON-CONSENSUAL REFERENCE OF DAMAGES ACTIONS IN DEROGATION OF THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

Both the structure of the Federal Magistrates Act and the constitutional backdrop against which it was enacted

---

(Continued from previous page)

or rules of court explicitly distinguish between "conditions of confinement" and the "conduct of correctional officials." Cal. Rules of Court App. 1, § 6.5 (Deering 1990). *See also* La. Rev. Stat. Ann. § 15:1171(B) (West Supp. 1990) (distinguishing actions "pertaining to conditions of confinement" from those pertaining to "personal injuries, medical malpractice, time computations . . . or challenges to rules, regulations, policies, or statutes").

confirm that § 636(b)(1)(B) does not authorize non-consensual reference of damages actions, as those premised on a single episode of unconstitutional conduct almost invariably are. Under settled principles, the Seventh Amendment entitles prisoners who bring such actions to trial by jury. Because Congress must be presumed not to have legislated in derogation of this basic right, the court of appeals' position could only be correct if a magistrate, having been referred a case pursuant to § 636(b)(1)(B), were authorized to conduct a jury trial. As both the history and text of the Act make clear, however, Congress did not empower magistrates to conduct jury trials in *any* case referred without the parties' consent – and, indeed, might well have been constitutionally prohibited from doing so. In light of these related considerations – the right to a jury trial in this class of cases and the absence of a mechanism for vindicating that right in suits referred under § 636(b)(1)(B) – Congress plainly intended to confine such referrals to purely injunctive actions broadly challenging ongoing, pervasive conditions of confinement.

1. Prisoner complaints predicated on a single episode of unconstitutional conduct almost invariably are brought under 42 U.S.C. § 1983 and seek damages as the principal or exclusive form of relief.[13] As with damages

---

[13] *See, e.g., Albers v. Whitley*, 743 F.2d 1372, 1373 (9th Cir. 1984), *rev'd*, 475 U.S. 312 (1986); *Sheffey v. Greer*, 391 F. Supp. 1044 (E.D. Ill. 1975). See *also Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). While, as this case demonstrates, prisoners bringing such suits sometimes also request injunctive relief, they are

(Continued on following page)

claims brought under other federal civil rights statutes, the Seventh Amendment endows the parties involved in such suits with the right to trial by jury. *See Curtis v. Loether*, 415 U.S. 189, 192-98 (1974) (Title VIII); *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1335 (1990) (42 U.S.C. § 1981). Section 1983 "creates a species of tort liability" and entitles prevailing plaintiffs to legal remedies "determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (citations and internal quotations omitted). Under the Court's established Seventh Amendment jurisprudence, *see Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989), the jury-trial right unquestionably attaches in such actions.[14]

2. It is equally plain that Congress did not authorize magistrates to conduct a jury trial in cases referred pursuant to § 636(b)(1)(B). That conclusion is evident on the face of the statute, is confirmed by the legislative history,

---

(Continued from previous page)

usually not entitled to it. Unless the prisoner can demonstrate that the unconstitutional conduct is likely to reoccur – a difficult showing when the prisoner is alleging only a single episode of excessive force – equitable relief is not available. *City of Los Angeles v. Lyons*, 461 U.S. at 111-12.

[14] Although, to our knowledge, this Court has never addressed the issue directly, the lower federal courts have never doubted that § 1983 damages claimants are entitled to trial by jury. *See, e.g., Segarra v. McDade*, 706 F.2d 1301, 1304 & n.6 (4th Cir. 1983); *Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1980). *See also Carlson v. Green*, 446 U.S. 14, 22 (1980) (*Bivens* action for money damages based on deliberate indifference to the serious medical needs of a federal prisoner carries with it the right to trial by jury).

and has received universal approval in the lower federal courts.[15]

Section 636(b)(1)(B) – which authorizes magistrates to conduct "hearings," not trials – was enacted in 1976. Responding to this Court's decision in *Wingo v. Wedding*, 418 U.S. 461 (1974), which had construed the 1968 Act to prohibit magistrates from conducting habeas hearings, Congress sought both to clarify and expand magistrates' authority in two related ways. First, it authorized non-consensual referral of certain pretrial motions, *e.g.*, motions to dismiss or for summary judgment. Second, it empowered magistrates to hear "applications for posttrial relief made by individuals convicted of criminal offenses and . . . prisoner petitions challenging conditions of confinement." With respect to all of the matters referenced in § 636(b)(1)(B), the magistrate was directed to submit to the district court "proposed findings of fact" as well as a recommended "disposition" of the issue. To the extent a party makes timely objections to such findings or recommendations, the district judge "shall make a de novo determination" of the matter and, in all events, retains the power to "accept, reject or modify" the magistrate's report "in whole or in part."

Both the language and structure of § 636(b)(1)(B) make clear that it does not authorize magistrates to conduct jury trials. To begin with, the section contains no reference to juries, much less a specific authorization. As the Court has held in construing a related provision of

---

[15] *See, e.g., Hall v. Sharpe*, 812 F.2d 644, 647-49 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132, 1135-37 (5th Cir 1987) (en banc); *Wimmer v. Cook*, 774 F.2d 68, 73-74 (4th Cir 1985).

the Act, Congress's "fail[ure] even to mention th[e] matter in the statute" is itself a strong indication that jury trials were not within its contemplation. *Gomez v. United States*, 109 S. Ct. 2237, 2246-47 (1989).[16] Moreover, findings of fact generated pursuant to a § 636(b)(1)(B) reference are subject to "de novo determination" by the district court. While that standard of review is probably necessary to satisfy Article III concerns, *see United States v. Raddatz*, 447 U.S. 667, 681-84 (1980), it is inherently incompatible with trial by jury: Reviewing a jury verdict under a *de novo* standard would either effectively deny the right to trial by jury or impermissibly abrogate the district court's assigned, and perhaps constitutionally compelled, role as the ultimate factfinder.[17] For similar reasons, *de novo* review of a jury verdict makes no practical sense. Even for the more limited task of having magistrates empanel juries, this Court has expressed "serious

---

[16] It is also noteworthy in this regard that all of the other items enumerated in § 636(b)(1)(B) are non-jury matters, such as applications for preliminary injunctive relief and motions to dismiss. In addition, as several courts have noted, the phrase "prisoner petitions challenging conditions of confinement" is itself inconsistent with an intent to authorize magistrates to conduct jury trials. *See, e.g., Ford v. Estelle*, 740 F.2d 374, 378 (5th Cir. 1984) (use of word "petition" indicates "Congress' . . . intention to allow reference only of nonjury matters" under § 636(b)(1)(B)); *see also Black's Law Dictionary* 1031 (5th ed. 1979) (defining "petitioner," among other things, as "[t]he one who starts an equity proceeding or the one who takes an appeal from a judgment.").

[17] *See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) (Reexamination Clause of Seventh Amendment bars redetermination by court of facts found by a jury).

doubts that a district judge could review [that] function meaningfully" under the *de novo* standard of § 636(b)(1)(B). *Gomez v. United States*, 109 S. Ct. at 2247.

Finally, while the text and structure of § 636(b)(1)(B) are independently conclusive, subsequent amendments to the Act confirm that magistrates are not authorized to conduct jury trials in cases referred under that provision. In 1979, Congress amended the Act by adding a new section expressly empowering magistrates to conduct "any or all proceedings in a jury or nonjury civil matter" provided appropriate consent is obtained from the parties. 28 U.S.C. § 636(c)(1). *See also* 18 U.S.C. § 3401(b) (also added in 1979). The legislative history of those amendments reveals a clear understanding on the part of Congress that magistrates were not authorized to conduct jury trials under *any* section of the pre-1979 Act.[18] *See Gomez v. United States*, 109 S. Ct. at 2244.

3. The language and structure of § 636(b)(1)(B), together with the constitutional concerns they reflect, are fundamentally incompatible with the interpretation adopted by the court of appeals and advanced by respondents here. It defies common sense to believe that Congress – which is presumptively aware of the constitutional backdrop against which it acts – authorized

---

[18] S. Rep. No. 74, 96th Cong., 1st Sess. 4-5, *reprinted* in 1979 U.S. CODE CONG. & ADMIN. NEWS 1469, 1472-73; H.R. Rep. No. 287, 96th Cong., 1st Sess. 1, 8-11 (1979); *see also Hall v. Sharpe*, 812 F.2d 644, 646-47 (11th Cir. 1987); *In re Wickline*, 796 F.2d 1055, 1058 n.6 (8th Cir. 1986); *Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984).

the wholesale, non-consensual assignment of a class of cases, for which the parties are entitled to trial by jury, to a magistrate who lacks the power even to empanel a jury, much less to conduct a full trial before one. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988) (because Congress "swears an oath to uphold the Constitution," the Court will "not lightly assume that Congress intended to infringe constitutionally protected liberties"). That conclusion is further reinforced by the fact that all of the other items enumerated in § 636(b)(1)(B) clearly pertain to nonjury matters, *e.g.*, habeas petitions and motions for preliminary injunctive relief. Given this textual context, the clarity of the Seventh Amendment right, and the absence of a mechanism for vindicating that right under the statute, it would be highly anomalous to assume that Congress intended to authorize non-consensual referral of simple damages cases such as petitioner's.[19]

---

[19] In this regard it is of no consequence that a party may always waive the right to trial by jury, as petitioner was found to have done here. The issue in this case is not whether the statute is unconstitutional as applied, but how best to interpret Congress's intent. In our view, it is non-sensical to believe that Congress would have authorized the non-consensual reference of a whole class of cases to which the Seventh Amendment right so clearly attaches without making some explicit provision to assure that the right could be vindicated – *e.g.*, by authorizing magistrates to conduct jury trials or by providing that such cases shall be subject to non-consensual reference "unless a party demands a jury." Congress, of course, did neither.

In light of these considerations, by far the more coherent interpretation is to construe the phrase "prisoner petitions challenging conditions of confinement" as referring to purely injunctive actions alleging ongoing, pervasive circumstances or practices. That construction conforms to the "settled policy" of avoiding interpretations that "engender[] constitutional issues," reflects the most natural reading of the language, *see supra* pp. 13-18, and fits most comfortably into the overall framework of both the statute as a whole and § 636(b)(1)(B) in particular. *Gomez v. United States*, 109 S. Ct. at 2241.

4. Moreover, this interpretation is consistent with Congress's avowed objective of relieving the district courts of many of their most time-consuming burdens while being "alert" to the constitutional limits on the exercise of judicial power by non-Article III officers. *United States v. Raddatz*, 447 U.S. at 681-84.[20] On the one hand, Congress had doubts about whether any non-consensual reference would be constitutionally permissible unless the district court retained its authority as the ultimate fact-finder – a status inherently inconsistent with allowing magistrates to oversee jury trials.[21] Accordingly,

---

[20] *See also* S. Rep. No. 625, 94th Cong., 2d Sess. 5-6 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6167-68.

[21] *See, e.g.*, S. Rep. No. 625, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6168. The legislative reports of both chambers cite a Seventh Circuit decision that extensively reviewed the history of the Federal Magistrates Act and observed that Congress's Article III concerns

(Continued on following page)

it clearly did not contemplate non-consensual reference of matters that would require trial by jury. On the other hand, when it enacted the § 636(b)(1)(B) in 1976, it was surely aware of a new and burgeoning category of prison reform cases, typically brought as class actions, in which inmates sought broad injunctive relief to improve the conditions of their confinement. *See, e.g., Pugh v. Locke,* 406 F. Supp. 318, 328 (M.D. Ala. 1976) ("Federal litigation by prisoners alleging systemic constitutional deficiencies has mushroomed in recent years."), *aff'd as modified,* 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds,* 438 U.S. 781 (1978) (per curiam).[22] Interpreting § 636(b)(1)(B)

(Continued from previous page)

were "to a certain extent, tied to the constitutional guarantee to a trial by jury." *TPO, Inc. v. McMillen,* 460 F.2d 348, 354 n.37 (7th Cir. 1972). *See* S. Rep. No. 625, 94th Cong., 2d Sess. 3-4, 9 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5-6, 11, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6165-66, 6171.

[22] *See generally Rhodes v. Chapman,* 452 U.S. at 353-63 (Brennan, J., concurring) (chronicling the development of this type of lawsuit). Prototypical examples of such cases litigated at or near the time Congress enacted § 636(b)(1)(B) include: *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); *Newman v. Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974); *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F. Supp. 676 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir. 1974); *Diamond v. Thompson,* 364 F. Supp. 659 (M.D. Ala. 1973); *McCray v. Sullivan,* 399 F. Supp. 271 (S.D. Ala. 1975). Academic commentators had also recognized such litigation as a new and distinct legal phenomenon. *See, e.g.,* Comment, *The Role of the Eighth Amendment in Prison Reform,* 38

(Continued on following page)

in the manner we suggest fulfills both of Congress's objectives: it delegates a large category of extremely time-consuming litigation to magistrates, while recognizing the care Congress took to assure that any such delegation conform to the Constitution.[23]

Not surprisingly in light of these objectives, the legislative history is fully consistent with the conclusion that

---

(Continued from previous page)

U. Chi. L. Rev. 647, 651, 655-63 (1971); *see generally* P. Low and J. Jeffries, *Civil Rights Actions: Section 1983 and Related Statutes* 679-81 (1988). In such cases, magistrates perform a great variety of functions, resulting in a significant savings of judicial resources. *See* Note, *"Mastering" Intervention in Prisons,* 88 Yale L.J. 1062, 1068-72 (1979).

[23] It is, of course, always possible for prisoners to include a damages claim even in a broad-based conditions suit, although that approach appears to be very much the exception to the rule – both because of the difficulty of certifying a class in a damages action premised on systemic allegations and the likelihood that prison officials in such suits will be immune from damages as a matter of law. *See Cleavinger v. Saxner,* 474 U.S. 193 (1985). Even when a damages claim is included, however, the magistrate may still relieve the district court of much of the burden of the litigation. For example, a magistrate can handle a variety of pretrial matters under the authority of § 636(b)(1)(A), and under § 636(b)(1)(B) may hold hearings and make recommendations pertaining to motions for summary judgment or to dismiss, including those contending that the damages portion of the claim should be dismissed on immunity grounds. In addition, the court can sever the damages claim and refer the equitable claims to the magistrate to be resolved first. While, as a formal matter, any findings of fact stemming from the initial hearing will not have collateral estoppel effect in a subsequent damages action, there will be many cases that will either settle or not be pursued after disposition of the equitable claims.

"prisoner petitions challenging conditions of confinement" refers to injunctive suits alleging ongoing, pervasive practices or circumstances. Because the principal focus of the 1976 amendments was to authorize magistrates to hold habeas hearings (in response to *Wingo v. Wedding*), specific references to the prisoner-petition clause are exceedingly sparse and largely unhelpful. Nonetheless, relying on several allusions to 42 U.S.C. § 1983 in the House Report, the court of appeals apparently believed that the prisoner-petition clause was intended to cover *all* prisoner litigation brought under that section. *See* J.A. 65-66. In point of fact, excerpts from elsewhere in the Reports suggest precisely the opposite conclusion.[24] Moreover, the court of appeals' view simply makes no sense. Reading the prisoner-petition clause as coextensive with § 1983 is both over-inclusive – in that it would include damages actions and suits premised on pre-conviction conduct – and underinclusive, in that it would exclude actions brought by federal prisoners or against private parties, *e.g.*, the contractor who built the

[24] *See, e.g.*, S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976) (Act "grants to the magistrates the power . . . to hear and recommend a dispostion of certain dispositive motions, including . . . *certain prisoner petitions*") (emphasis added). Self-evidently, the underscored language is inconsistent with an intent to include *all* prisoner litigation within its ambit. *See also* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6171 ("petitions under section 1983 of title 42 United States Code brought by prisoners' [sic] *challenging the conditions of their confinement*") (emphasis added); *see also* S. Rep. No. 625, 94th Cong., 2d Sess. 9 (1976) (same). Unless the highlighted language is read to limit or restrict what precedes it, it is redundant.

facility. As reference to the text, history, and underlying purposes make clear, Congress did not paint with so coarse a brush.

In sum, the prisoner-petition clause of § 636(b)(1)(B) does not encompass damages actions premised on an isolated episode of unconstitutional conduct. That conclusion requires reversal here. The only issue joined at trial in this case was whether respondents violated petitioner's constitutional rights when, on a single occasion, they forcibly removed him from his cell and "sprayed him with 'Big Red,' a chemical weapon similar to mace." J.A. 25. Because that complaint, which sought both compensatory and punitive damages, does not constitute a "prisoner petition[ ] challenging conditions of confinement," the court of appeals erred in holding that it was subject to non-consensual referral under § 636(b)(1)(B).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOEL I. KLEIN
CHRISTOPHER D. CERF*
ALAN E. UNTEREINER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184

Counsel for Petitioner

*Counsel of Record